SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 53 53

CLYDE WILKERSON,

Petitioner,

vs.

WILSON McCARTHY and HENRY SWAN, as Trustees of The Denver and Rio Grande Western Railroad Company, a corporation,

Respondents.

RESPONDENTS' PETITION FOR REHEARING

WALDEMAR Q. VAN COTT,
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Attorneys for Respondents.

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CASES CITED

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PRELIMINARY STATEMENT

The above named respondents respectfully submit this, their petition for rehearing in the entitled cause. As the Court is aware, five separate opinions were rendered in this case on January 31, 1949. The majority opinion written by Mr. Justice Black reversed the judgment of the Supreme Court of Utah and remanded the case for another trial. The effect of the Court's decision was to hold that the trial court erred in granting a motion for a directed verdict for the respondents. In

the course of its opinion, this Court decided: (1) That the facts of the case presented a conflict in the evidence with respect to the issue of whether after the erection of the guard posts and safety chains the pit workers alone continued to use the board across the pit as a walkway or whether employees generally so used it (page 7 of Mr. Justice Black's opinion); (2) that, assuming a jury resolved the foregoing question in favor of the petitioner, then, as indicated by the Utah Supreme Court, a jury question was presented "on the condition of the board and the adequacy of the enclosure." But the majority opinion of the Court disregarded and left unresolved two of the chief contentions of the respondents. A decision on either of these contentions in a manner favorable to respondents would require an affirmation of the ruling of the trial court in this case.

The first question left undecided by the Court consists of the following proposition: Assuming that the "very narrow conflict in the evidence" stated by the Court were resolved in the petitioner's favor, and that employees, generally, in the respondents' yard continued to use the board within the chained area as a walkway, then what could or should the respondents have done under the circumstances? Did the situation impose an "additional" duty upon the respondents which they failed to discharge? If so, in what did the "additional" duty consist? Was it a duty possible of fulfillment under the physical facts and circumstances disclosed by the undisputed evidence? The answers to these queries involve an issue of law, not of fact, and this Court's opinion omits any determination of it. Respondents' argument in connection with this contention is set forth under subdivision 1 hereinafter.

The second question left undecided by the Court's majority opinion is as follows: Assuming that all employees used the board within the chained area as a walkway did a conflict of evidence exist with respect to "the condition of the board"? With respect to this question, the petitioner is limited to the particular allegations of negligence set forth in his complaint as filed in the lower court. An independent and impartial examination of these allegations and of the evidence adduced in support thereof will demonstrate conclusively that there

is no evidence of any defect or insufficiency in the condition of the board, notwithstanding statements in the opinion of the Utah Supreme Court apparently to the contrary. Respondents' argument in connection with this contention is set forth under subdivision II hereinafter.

If there is merit to either of the two foregoing contentions, then respondents are entitled to an affirmance of the decision of the lower court, regardless of the "very narrow conflict of evidence" noted in the Court's majority opinion. Since neither of these contentions were determined by the Court in the several opinions filed, it is respectfully submitted that this petition for rehearing should be granted, in order that a full disposition may be made of all the points at issue in this important case.

I

ASSUMING THAT THE BOARD ACROSS THE PIT WITHIN THE CHAINED AREA WAS USED AS A WALKWAY BY ALL EMPLOYEES, WHAT COULD OR SHOULD RESPONDENTS HAVE DONE?

The Court's majority opinion holds that a very narrow conflict of evidence existed for the jury to resolve with respect to "the continued use of the board as a walkway after erection of the chains . . .", that is, "whether the pit workers alone continued to use it as a walkway, or whether employees generally so used it" (page 7 of the majority opinion). But assuming the accuracy of the above statement and that the stated conflict were resolved in favor of the petitioner, there still remains the vital question of what could or should the respondent have done under the circumstances?

Presumably, the standard of conduct for the respondent is that of the ordinary prudent man under the same or similar circumstances. Thus, the prudent man is faced with the following practical problem. He maintains a pit which is indispensable to the operation of his business. In order for the men who work in the pit to do their work, it is necessary for a board to be maintained at a designated point across the pit. Not only do the pit men require the use of this board, but employees

generally have been accustomed to cross the pit by means of this board. Under these circumstances, how can the average prudent man give warning to his employees of the dangers involved in this physical structure and still continue to use the pit for the necessary purposes of his business? Shall he eliminate the pit altogether? If he did so, he undoubtedly would have to discontinue his business. Shall he construct a solid barricade around the pit? If he did that, the work of the pit men would be made impossible. Shall he post warning signs or issue verbal or written instructions? Experience has taught him that employees frequently forget or disregard such warnings. Finally, he determines that the most logical and feasible solution is to erect guard posts and safety chains completely surrounding the pit area, thus effectively blocking off the approach to the board which had been used as a passageway. The posts and chains then act not only as an obvious warning and barricade to all employees who approach the board, but they are so erected that the pit men still can do their work at the pit with a minimum of interference. Up to this point, can it possibly be said that the prudent man has failed to live up to reasonable standards of ordinary care for the safety of his employees?

The problem facing the respondents in the case at bar was met and solved in exactly the manner outlined. Since railroad cars had to be moved on and off the pit for a wheel change, the safety chains had to be erected so as not to interfere with that movement. Also, the guard posts next to the car on the pit had to be placed so as not to interfere with the movement, when cars with an unusually wide overhang were brought to and from the pit. When cars of the latter type were on the pit, no gap at all existed between the chain posts and the side of the car. In no instances was the gap ever wider than 5 to 7 inches (R. 59-60). At all times when the pit was in use the safety chains extended directly across and thereby blocked the approach to the 22 inch "permanent" board over the pit. What other reasonable precautions could the respondents have taken, consistent with the continued use and operation of the wheel pit within the railroad yards?

Is the situation changed by reason of the fact that even after the erection of the guard posts and safety chains, the

respondents receive "constructive notice" that some employees, including switchmen working in the yard, persist in continuing to use the board as a passageway? Such "customary" use consists in a person squeezing sideways between the 5 to 7 inch gap which sometimes existed, moving sideways along the edge of the pit to the position of the "permanent" board, then swinging across the pit over the board, and around the chain post located on the opposite side (R. 46). Do these facts alter the measure of respondent's duty? If so, what other reasonable measures could or should the respondents have taken?

The answer to these queries is not to be found in the petitioner's complaint. Except for some feeble suggestions in his briefs on appeal to the effect that the guard posts and chains should be removed during daylight hours or that an armed guard should be stationed in the area, the petitioner never has advanced a single feasible suggestion as to what "additional measures" the respondents could or should have taken under the circumstances stated. The opinion of the Utah Supreme Court fails to suggest any "additional measures" that could or should have been taken. And the five opinions rendered by this Court are equally silent in this respect. The only logical answer is that no other reasonable measures remained that could be taken by respondents, except to fill up the pit and discontinue a necessary part of their business. As demonstrated by all the evidence, it would be contrary to reason and common sense to impose any further duty upon the respondents, in addition to the affirmative steps which already had been taken. There must be some point short of discontinuing essential operations connected with his business, beyond which the duty of the reasonably prudent employer does not extend. Surely the law does not require the unusual, the unfeasible or the impossible—even from an employer under the Federal Employers' Liability Act.

The physical facts as indicated by the model introduced as an exhibit in the case, the photographs in the record (R. 132A, 132B), and the uncontradicted testimony of all the witnesses at the trial, make it abundantly clear that the area of the wheel pit when blocked off by safety chains and guard posts was in no sense designed or intended as a passageway for employees. Any other inference from the evidence simply

would not make sense. The wheel pit was of considerable depth, lined with concrete, and filled with hoisting machinery. The area was clearly and inherently a dangerous and hazardous one. Without destroying the very purpose and function of the pit and its appurtenant equipment, there was no way that the area possibly could be made safe as a passageway for *all* employees in respondents' yard. To impose such a duty upon respondents would be to impose a duty practicably impossible of fulfillment. The law does not exact the impossible.

Reason and common sense still must be the final standard of action and opinion at law, as well as in other rules governing the conduct of human relations. Mere "custom" under the circumstances of the present case, surely is not sufficient to impose upon the respondents a duty to make safe an appliance which by its very nature can not be made safe for a purpose wholly contrary to its intended function and design. In other, though similar circumstances, this Court refused to hold a railroad company liable for an injury to an employee resulting from the striking of a derailer from an unexpected direction, where the striking of the derailer was "so contrary to the purpose" of the derailer that provision to guard against such happening was beyond the requirement of due care, though there existed evidence of a "custom" to the effect that striking the derailer from an unexpected direction had "happened very frequently" and that it had "happened 25 to 50 times". *Brady* v. *Southern Ry Co.*, 320 U. S. 476, 64 S. Ct. 232; again, see *Freeman* v. *Garretts*, (Sup. Ct. Tex.), 196 S. W. 506. To hold under the facts of this case that the "custom" of forcing a passageway through the narrow space which sometimes existed between the guard posts and a car standing on Track 23½ would impose some additional, unalleged, unspecified, and unknown duty upon the respondents, other than the precautionary measures previously taken, indeed, would be a resort to "dialectical subtleties". Such type of reasoning has been expressly condemned by this Court. *Coray* v. *Southern Pacific Company*, 335 U. S. , 69 S. Ct. 275, 276.

II

THE RECORD IN THE TRIAL COURT CONTAINS NO EVIDENCE OF ANY DEFECT OR INSUFFICIENCY IN THE CONDITION OF THE BOARD.

After determining that the issue of whether the board located within the chained area had been used as a walkway by all employees was a matter for the jury, the Court then quoted with approval the following statement from the opinion of the Utah Supreme Court:

> "It must be conceded that if defendants knew or were charged with knowledge that switchmen and other workmen in the yard were habitually using the plank as a walkway in the manner claimed by plaintiff, then the safety enclosure might be entirely inadequate, and a jury question would have been presented on the condition of the board and the adequacy of the enclosure."

Further language of the Utah Supreme Court also was quoted to the effect that under different facts, maintenance of a "22 inch board for a walkway, which is almost certain to become greasy or oily, constitutes negligence." This Court indicated its general agreement with the foregoing quotations.

But with due deference to the quoted dictum from the opinion of the State Supreme Court, and of this Court's apparent approval thereof, the respondents respectfully request this Court to examine the pleadings and the record in this case, independently of the views expressed by the Utah Supreme Court. After all, the query is not whether the Utah Supreme Court was right or wrong, but whether the trial judge who heard the witnesses and examined the physical evidence properly directed a verdict.

The complaint in this case alleges that respondents were negligent in the following particulars and in no others, namely, that the pit boardway (1) was not firmly set, (2) was not securely attached, and (3) although only about 20 inches wide, the boardway had been permitted to become greasy, oily, and slippery, thereby causing petitioner to lose his balance, slip, and fall into the pit (page 1, majority opinion by Mr. Justice Black).

No contention is made by the petitioner or anyone else that allegations (1) and (2) above, are in any manner supported by the evidence. In fact, all the evidence is affirmatively to the contrary. Presumably, the petitioner abandoned any

contentions based on these allegations, both in the trial court and in the later appellate stages of the case. Neither do the allegations of the complaint in any manner specify, nor does the evidence in any respect suggest, any "inadequacy of the enclosure," as such, notwithstanding language intimating otherwise in the opinion of the Utah Supreme Court. There remains, therefore, only the single allegation referring to the condition of the board and whether grease and oil had been allowed to accumulate thereon. Was there any substantial evidence sufficient to make a question for the jury on this issue?

An examination of the record will disclose not a single shred of evidence which in any manner supports this allegation. The uncontradicted evidence was that the board over the pit fitted firmly (R. 57, 84). It weighed about 75 pounds (R. 88) and was 22 inches wide (R. 57). At each end of the board a steel lip of Z-iron construction was attached (R. 57-58). This steel lip fitted over the edge of the cement wall of the wheel pit so as to make it flush with the top of the ground (R. 58). The board fitted snugly in place (R. 58, 75); it had no play or wobble in it (R. 75). It was just a little bit longer than the other boards, so as to make it fit a little tighter because it was used as a brace (R. 74, 87-88). According to petitioner's own testimony, he crossed the board about an hour and a half before his accident on the same morning (R. 101). At that time he saw grease on the board (R. 39), but it seemed perfectly safe and secure (R. 101). It did not wobble and wasn't infirm; it seemed solid (R. 101). When he started to cross the board on the occasion of his injury, it felt like there was a pebble or rock under it (R. 49). But he didn't see any pebble or rock and didn't examine the board (R. 49). So his statement about a pebble or rock under the board would be just a guess (R. 49). As he began to cross, he "just glanced at the position of the board" (R. 98). He noticed one little spot of grease, but didn't know whether he slipped on that particular spot of grease or not (R. 99). He didn't notice that he ever stepped into the grease, or whether he really got into the grease (R. 99). He couldn't swear as to whether his foot slipped in the grease (R. 100). He didn't see any grease on the board before he stepped on it (R. 100).

Hawkins, a carman, assigned to work in the wheel pit, came out of the pit just a few minutes before petitioner was injured (R. 83). He stepped onto the cover board and over the safety chain in leaving the pit. The board was firm and free from oil as far as he could see (R. 84). The wheel pit was cleaned regularly about twice a week for the purpose of eliminating grease and oil (R. 90). It was to Hawkins' advantage to keep grease and oil off the board, because otherwise he might take a tumble into the wheel pit himself (R. 90). Up to the time that petitioner was hurt, Hawkins had never seen any oil on the board (R. 93). During the past two years that Hawkins had worked at the wheel pit, he had seen oil on the board once. That was in February, 1946 (R. 92), approximately eight months *after* the date of petitioner's accident. There was a practice of keeping oil off the board (R. 92), and to Hawkins' knowledge there had been no oil on the board except on this one occasion referred to, some time after the accident to petitioner (R. 93). Subsequent to petitioner's accident, the board was in continuous use until August 12, 1946, when it was removed from the wheel pit (R. 60, 93) and brought to Salt Lake City as an exhibit in this case. The board was introduced in evidence during the trial of the case (R. 108) and was examined by the trial judge. It was in the same condition at the trial, as at the time of the petitioner's accident (R. 60, 87).

On the basis of the foregoing testimony, undisputed and uncontradicted, the trial judge held that even if the so-called "permanent" board was "customarily" used as a passageway by all employees, there was insufficient evidence from which any inference of negligence could be made by a jury with respect to the condition of the board. Regardless of contrary intimations in the opinion of the Utah Supreme Court, it is respectfully submitted that an independent examination of the record by this Court will confirm the judgment of the trial court. Respondent submits that, in this respect, it is entitled to this Court's independent appraisal and opinion.

CONCLUSION

It is apparent from the five separate opinions filed, that this case was an occasion for considerable discussion and

divergence of viewpoint between the members of the Court. In the concurring opinion of Mr. Justice Douglas, the Court went so far as to take the opportunity "to account for our stewardship" in the entire group of cases heretofore considered by the Court arising under the Federal Employers' Liability Act. Certain it is that the several opinions of the Court will be read with great interest and "perspicacity" by the lower courts and the profession.

In view of the foregoing considerations, respondents respectfully request that a rehearing be granted, not only for the further benefit and guidance of the lower court upon a retrial of this particular case, if a retrial is decided to be necessary, but also in order to give the bench and bar at large a full exposition and decision with respect to all the essential issues necesarily involved in the case.

Respectfully,

WALDEMAR Q. VAN COTT,
DENNIS McCARTHY,
Attorneys for Respondents.

CERTIFICATE

Dennis McCarthy, one of the attorneys for the respondents, hereby certifies that the foregoing Petition for rehearing is presented in good faith and not for the purpose of delay.

DENNIS McCARTHY,